

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE

In re:

SCT YARNS, INC.

Debtor

No. 95-11611  
Chapter 11

**MEMORANDUM AND ORDER ON  
MOTION FOR STAY PENDING APPEAL**

This Chapter 11 case is presently before the Court on the Motion For Stay of Order Pending Appeal and For Expedited Hearing filed October 20, 1995, by Primex Plastics Corporation ("Primex"). Primex filed a Notice of Appeal contemporaneously with the Motion For Stay. The Order from which Primex attempts to appeal and the Order for which it seeks to stay implementation is an Order entered October 16, 1995, authorizing the sale of Debtor's real property in Jefferson County, Georgia, for the sum of Three Million Dollars (\$3,000,000.00). For the reasons hereinafter stated, the Motion For Stay will be denied.<sup>1</sup>

The criteria to consider on a motion pursuant to Bankruptcy Rules 7062 and 8005 are the same criteria that a district court would consider in an appropriate motion brought pursuant to FED. R. CIV. P. 62 and FED. R. APP. P. 8. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th Cir. 1991), *rev'd on other grounds* 954 F.2d 1174 (6th Cir. 1992). The factors to be considered regarding the issuance of a stay pending appeal are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be

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<sup>1</sup>Primex has also filed a Motion to Extend Time By Which Order Becomes Final Until After Hearing On Motion to Stay. By entry of this Memorandum and Order, that Motion becomes moot.

irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskil*, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987).

The October 16 Order contains detailed findings of fact and conclusions of law. The facts will be summarized. On September 20, 1995, the Debtor filed a Notice of Sale and Hearing on Motion For Authority to Sell Assets. One of the assets to be sold was the subject of a purchase agreement on the subject property between the Debtor and Primex. The purchase price was to be Two Million Six Hundred Fifty Thousand Dollars (\$2,650,000.00). The purchase agreement did not contain any overbid protection or break up protection. The purchase agreement was subject to court approval by its very terms and pursuant to 11 U.S.C. § 363. Though § 363 uses the term “trustee”, it applies to a debtor in possession such as the debtor in this case. 11 U.S.C. §§ 1107(a) and 1106(a).

An objection to the proposed sale and an offer to purchase the same property was submitted by Corporate Property Advisors, Inc. (“Corporate Property”), on October 10, 1995. Corporate Property proposed a purchase price of Two Million Eight Hundred Thousand Dollars (\$2,800,000.00). The proposal contained contingencies not in the Primex agreement.

A second objection was filed by EUA-Nova, Inc., a party to a lease of certain equipment located on the premises to be sold. That objection was resolved by the Debtor prior to the hearing and is of no import on this matter.

A third objection was filed by Shawmut Capital Corporation (“Shawmut”), a secured lender having an interest in the property to be sold. The Shawmut objection clearly states:

“Shawmut further objects to the sales to the extent that the court is presented at the hearing with an offer on terms superior to the ones outlined in the motion. Shawmut reserves the right to inspect any such offers at such time and announce its position at the hearing.”

The hearing on the motion was held October 12, 1995, as scheduled. At the hearing, it was determined that the contingencies contained in the offer of Corporate Property were unacceptable to the Debtor and Shawmut. Yet a third bidder, Gibbs International, Inc. (“Gibbs”), appeared at the hearing, through counsel, and made an offer to purchase the property for the sum of Three Million Dollars (\$3,000,000.00). The offer of Gibbs was substantially identical to the purchase agreement with Primex except for the increased purchase price. Essentially, the only contingencies would be court approval and marketable title.

Following the offer made by Gibbs, and once it was determined to be substantially identical to the purchase agreement with Primex, court was adjourned for approximately three (3) hours to allow the attorneys for Primex to determine whether a higher bid would be submitted. Upon reconvening the hearing, Primex did not indicate a willingness to make a higher bid.<sup>2</sup>

In a sale of its assets, the debtor’s principal obligation is to maximize the value for its creditors. *In re Wintex, Inc.*, 158 B.R. 540 (D.C. Mass. 1992); *In re Embrace*

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<sup>2</sup>Primex still has not shown an inclination to bid higher than Three Million Dollars (\$3,000,000.00). The thrust of its appeal appears to be that “the court had no authority to interfere with the proposed sale.” Brief in Support of Motion For Stay Pending Appeal filed October 23, 1995, at page 6.

*Systems Corp.*, 178 B.R. 112 (Bankr. W.D. Mich. 1995); *In re After Six, Inc.*, 154 B.R. 876 (Bankr. E.D. Penn. 1993). The court has wide latitude in the fashioning of a fair procedure that allows a stranger, not the debtor or the buyer whose sale is before the court for approval, to overbid and buy the property. See, *In re Wintex, Inc.*, *supra*; *In re The Charter Co.*, 829 F.2d 1054 (11th Cir. 1987), *cert. den.* 485 U.S. 1014, 108 S.Ct. 1488, 99 L.Ed.2d 715 (1988).; *G-K Development Co. v. Broadmoor Place Investments, L.P. (In re Broadmoor Place Investments, L.P.)*, 994 F.2d 744 (10th Cir. 1993), *cert. den.* 114 S.Ct. 877, 127 L.Ed.2d 73 (1994). Primex has not demonstrated an abuse of discretion by this Court.

Moreover, Primex has not demonstrated that it has standing to pursue the appeal it has filed. A potential buyer who has the opportunity to compete with another bidder and expressly declines is not an aggrieved party. *Zaccaro v. Bowery Savings Bank (In re Jewell Terrace Corp.)*, 10 B.R. 1008 (E.D. N.Y. 1981). Absent some other meritorious ground for appeal, an unsuccessful bidder is not an aggrieved person as is required. *G-K Development Co. v. Broadmoor Place Investments, L.P. (In re Broadmoor Place Investments, L.P.)*, 994 F.2d 744, note 2 (10th Cir. 1993), *cert. den.* 114 S.Ct. 877, 127 L.Ed.2d 73 (1994). A litigant is an aggrieved person so as to have standing to appeal only if the order from which he appeals diminishes his property, increases his burdens or impairs his rights. *In re El San Juan Hotel*, 809 F.2d 151 (1st Cir. 1987); *Kane v. Johns-Manville Corp.*, 843 F.2d 636 (2nd Cir. 1988); *In re Fondiller*, 707 F.2d 441 (9th Cir. 1983). Primex had no legally cognizable rights in the subject property unless and until the proposed sale was authorized by the court.

Finally, it should be noted, that the Debtor would have been unable to sell the property free and clear of the interests of Shawmut except in accordance with 11 U.S.C.

§ 363(f). Shawmut did not consent to the sale to Primex as stated in footnote 1 of Primex's Brief in Support of Its Motion For Stay Pending Appeal. Rather, Shawmut specifically urged the court to accept the higher bid of Gibbs. There can be no doubt that the bid of Three Million Dollars (\$3,000,000.00) by Gibbs was in the best interest of the Debtor and its creditors. Accordingly,

It is ORDERED that the Motion For Stay of Order Pending Appeal is denied;

It is FURTHER ORDERED that the Motion to Extend Time By Which Order Becomes Final Until After Hearing on Motion to Stay is denied as moot; and

It is FURTHER ORDERED that the hearing set for October 27, 1995, on the Motion For Stay of Order Pending Appeal is cancelled.

ENTER:

BY THE COURT

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R. THOMAS STINNETT  
U.S. BANKRUPTCY JUDGE